

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION**

LESLIE WASHINGTON,

Plaintiff,

CASE NO: 04-10352

vs.

DISTRICT JUDGE DAVID M. LAWSON  
MAGISTRATE JUDGE CHARLES E. BINDER

CHIEF JOHN DOE, Brownstown  
Police Dept., *et al*,

Defendants.

**REPORT AND RECOMMENDATION ON  
MOTION TO DISMISS IN LIEU OF FILING AN ANSWER**

This Report is entered under the authority given to this Magistrate  
Judge by an Order of Reference issued by District Judge Lawson  
pursuant to 28 U.S.C. § 636(b)(1)(A).

**I. RECOMMENDATION**

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant Kimberly Johnson's Motion to Dismiss in Lieu of Filing an Answer be **DENIED**, and that the Defendant be ordered to file an answer forthwith.

**II. REPORT**

Counsel for Defendant Officer Kimberly Johnson filed the instant motion (Dkt. 85) on December 14, 2007. In the motion, counsel argues that the Plaintiff failed to serve this Defendant within the time period prescribed by federal rules and for that reason, Defendant K. Johnson should be dismissed.

The Court finds the instant motion perplexing, since the responsibility for service on the Defendants did not lie with the Plaintiff. Once the Application to Proceed Without Prepayment of Fees was granted and service ordered by the Court, the U.S. Marshal's Service was responsible for serving those defendants identified by the Court. In this case,

after an initial review of the documents submitted by Plaintiff, a Report And Recommendation was filed in March of 2005 recommending that the Plaintiff's Complaint be dismissed for failure to exhaust administrative remedies. Two years later, an Order was filed rejecting that Report, citing a recent change in the law regarding the exhaustion standard. The case was returned to this judicial officer for further proceedings, and a complete screening was conducted.

In May of 2007, a second Report and Recommendation was filed recommending that a portion of the Complaint be dismissed, and included a list of defendants upon whom it would be appropriate to serve process. That Report was adopted on July 6, 2007. Three days later this judicial officer issued an Order Directing Service and specifically named the individuals that the U.S. Marshal's Service was to serve. That Order instructed the U. S. Marshal's Service to serve **Sergeant** Johnson, but **Officer** Johnson was omitted from the list. Upon realizing that these were two separate individuals, the Court issued an Order on November 28, 2007, instructing the U.S. Marshal's Service to serve **Officer** Johnson. The delay in serving Defendant **Officer** Johnson, therefore, had nothing to do with the Plaintiff. Accordingly, it is recommended that Defendant Kimberly Johnson's motion be **DENIED**, and that she be ordered to immediately answer Plaintiff's complaint.

### **III. REVIEW**

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. See *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6<sup>th</sup> Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981). The parties are advised that

making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. See *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6<sup>th</sup> Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6<sup>th</sup> Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

s/ Charles E. Binder

CHARLES E. BINDER

United States Magistrate Judge

Dated: December 17, 2007

#### **CERTIFICATION**

I hereby certify that this Report and Recommendation was electronically filed this date, electronically served on James Surowiec, Laurie Michelson and Geneva Halliday, served on Leslie Washington by first class mail, and served on District Judge Lawson in the traditional manner.

Date: December 17, 2007

By s/Jean L. Broucek

Case Manager to Magistrate Judge Binder